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MINEGAR CONTRACTING, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, For the Use of MINEGAR CONTRACTING, INC., Use Plaintiff, v. T.B. PENICK & SONS, INC.; LIBERTY MUTUAL INSURANCE COMPANY; DOES 1 to 10, inclusive, Defendants.	Civil Action File No. 5:17-CV-000576 COMPLAINT ON BOND (Miller Act)

Use Plaintiff complains and alleges:

FIRST CAUSE OF ACTION
(Breach of Contract)

1. The jurisdiction of this Court is based upon 40 U.S.C. §§3131-3133. The project upon which this suit is based is situated in this Judicial District.

2. At all times herein mentioned Use Plaintiff MINEGAR CONTRACTING, INC. ("MINEGAR") was and now is a corporation duly organized and existing under the laws of the State of California doing business and having its principal place of business in the County of San Diego, State of California, and is authorized to do business and does business in the County of San Bernardino, State of California.

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3. Defendant T.B. PENICK & SONS, INC. ("PENICK") was, and at all times herein mentioned is, a corporation, organized and existing pursuant to law doing business in San Diego County, California and is authorized to do business and does business in the County of San Bernardino, State of California. Defendant PENICK is and was the principal on the Payment Bond referred to herein.

4. Defendants LIBERTY MUTUAL INSURANCE COMPANY ("SURETY") and DOES 1 through 10, were at all times herein mentioned, and now are, corporations or business entities authorized to transact business as sureties upon bonds or undertakings pursuant to United States Government regulations.

5. Use Plaintiff is informed and believes that Defendant PENICK entered into a written contract with the United States of America, through the Department of the Navy, Contract No. N62473-09-D-1651 ("Contract") for the certain work of improvement consisting of the construction of project P-177 Multi-Use Operational Fitness Area, Marine Corps Air Ground Combat Center, Twentynine Palms, California ("Project").

6. Defendant PENICK, as principal, and Defendants SURETY and DOES 1 through 10 as sureties, executed and delivered certain Payment Bond(s) guaranteeing the payment to all persons supplying labor and material in the prosecution of the work provided for in said Contract No. N62473-09-D-1651 and any and all duly authorized modifications thereof, which said bond was executed and delivered as aforesaid in accordance with the provisions of an act of the Legislature of the United States of America referred to as the Miller Act.

7. Use Plaintiff MINEGAR entered into a written subcontract with Defendant PENICK with respect to the Contract and the Project, pursuant to which Use Plaintiff MINEGAR agreed to provide and install labor and materials, specifically tilt-up concrete work, for use on and incorporation into the Project. The initial subcontract amount for work to be performed was $397,576.00. A copy of the written subcontract is attached here to as Exhibit "A" and incorporated herein by reference.

8. During the course of the performance, construction, and prosecution of the Contract and Project, and between July 7, 2015 and August 19, 2016, Use Plaintiff delivered and installed the tilt-up concrete work pursuant to the terms of its subcontract. Use Plaintiff provided additional labor and

material pursuant to multiple change orders for the additional sum of $48,634.70.

9. Use Plaintiff performed and completed all obligations to be performed by it pursuant to the terms and conditions of the subcontract. Use Plaintiff had conditionally agreed to provide a discount to PENICK in exchange for payment in December 2016, however PENICK failed and refused to make final payment as agreed and therefore waived any discount.

10. The labor materials so furnished by Use Plaintiff in the prosecution of the Contract and the Project, and not paid for, were and are reasonably worth the sum of $75,471.47. There is now due, owing and unpaid to Use Plaintiff the sum of $75,471.47, plus interest at the rate of 10% per annum, from the dates payment was due, after deducting all just credits and offsets.

11. Plaintiff is informed and believes and thereon alleges that the written subcontract between Use Plaintiff and PENICK, at Paragraph 6.5, provides that if it becomes necessary to employ an attorney for collection of the monies due under the subcontract, that reasonable attorneys fees will be paid. Use Plaintiff has retained Flaherty & Flaherty, APLC as its attorney and seeks recovery of its attorney fees, expert fees, and costs incurred.

12. A period of 90 days has elapsed from the date that Use Plaintiff last provided work on the Project and Use Plaintiff finished its work on the project within the year immediately preceding the date this complaint was filed.

SECOND CAUSE OF ACTION
(On Miller Act Bond)

13. Use Plaintiff incorporates by reference Paragraphs 1 through 12 hereinabove, as though the same are set forth in full herein.

14. Use Plaintiff performed and completed all obligations to be performed by it pursuant to the terms and conditions of its subcontract with Defendant PENICK.

15. Use Plaintiff has not been paid in full for said labor materials furnished in the prosecution of said work, as aforesaid; more than ninety (90) days and less than one (1) year have elapsed after the date on which the last of said labor materials were furnished as hereinabove set forth; the balance thereof unpaid at the time of the commencement of this action is $75,471.47.

16. Defendants SURETY and DOES 1 through 10 are responsible for payment to Use

Plaintiff herein.

THIRD CAUSE OF ACTION
(On Common Count)

17. Use Plaintiff refers to and incorporates as through fully set forth herein, Paragraphs 1 through 16.

18. Within the last two years at San Bernardino County, California, Defendant PENICK became indebted to Use Plaintiff on an open book account for money due in the sum of $75,471.47.

19. Neither the whole nor any party thereof has been paid, although demand therefore has been made and there is now due, owing and unpaid the sum of $75,471.47 with interest thereon according to proof.

WHEREFORE, Use Plaintiff prays judgment against each of the Defendants, jointly and severally, as follows:

1. For the sum of $75,471.47, plus interest at the rate of 10% per annum from the dates each payment was due, to the date of entry of judgment;

2. For reasonable attorney's fees;

3. For costs of suit; and

4. For such other and further relief as the court deems just and proper.

FLAHERTY & FLAHERTY
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Dated: March 27, 2017

By: /s/ Douglas P. Flaherty
James H. Flaherty, Jr.
Douglas P. Flaherty
Attorney for Use Plaintiff
MINEGAR CONCRETE, INC.